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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 370

ALBERT E. QUINTON, ET AL.,

Petitioners,

-vs-

FRANK J. ROONEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions below	1-2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4-11
Reasons for granting the writ	11-28
	App.
Appendix A—Findings of Fact and Conclusions of Law—U. S. District Court	1-5
Appendix B—Final Decree—U. S. District Court	6-7
Appendix C—Opinion—Court of Appeals	8-19
Appendix D—Judgment—Court of Appeals	20

AUTHORITIES

Cases:	Page
Austerberry vs. U. S. (6th Cir. 1948) 169 F2d 583	19
British Transport Commission vs. U. S. (U. S. 1957) 354 U. S. 129, 77 S. Ct. 1103, 1 L. Ed. 2d 1234	11
Coryell vs. Phipps (U. S. 1943) 317 U. S. 406, 63 S. Ct. 291	12, 13, 15, 17, 19, 22, 23
Crumady vs. The Joachim Hendrik Fisser (U. S. 1959) 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 417	28
Gosnell vs. U. S. (4th Cir. 1959) 262 F2d 559	24
In re Reading's Petition (D.C.N.D.N.Y. 1958) 169 F. Supp. 165	21
In re New York Dock Co. (2nd Cir. 1932) 61 F2d 777, 1932 A.M.C. 1492	22
In re Great Lakes Transit Corp. (6th Cir. 1936) 81 F2d 441, 1936 A.M.C. 267	23
Kutger vs. U. S. (D.C. Fla. 1958) 169 F. Supp. 104	13, 19
Lord vs. Goodall S.S. Co. (9th Cir. 1877) 15 Fed. Cas. No. 8506, aff'd. (U. S. 1880) 102 U. S. 541, 26 L. Ed. 224	14
Lee-Wood Boat and Motors vs. Rockwell (8th Cir. 1957) 245 F2d 306	24

AUTHORITIES (cont.)

	Page
McAllister vs. U. S. (U.S. 1954) 348 U.S. 19, 75 S. Ct. 6, 99 L.Ed. 20	27
Moore vs. American Transportation Co. (U. S. 1861) 65 U. S. 1 24 How. I. 16 L. Ed. 674	12
Maryland Casualty Co. vs. Cushing (U. S. 1954) 347 U. S. 409, 74 S. Ct. 608, 1954 A.M.C. 837	12, 21
Petition of Boat Demand Inc. (D.C. Mass. 1958) 160 F. Supp. 833	19
Petition of Martin (D.C. Pa. 1951) 102 F. Supp. 43	13
Petition of Moore-McCormack Lines, Inc. (D.C. N.Y. 1957) 147 F.Supp. 816	13
Petition of Skibs a/s Jolund (D.C.N.Y. 1956) 144 F. Supp. 47, rev'sd. 250 F2d 777	13
Rooney vs. Nuta (5th Cir. 1959) 267 F2d 142	2
The Advance (2nd Cir. 1930) 43 F2d 824, 828 1930 A.M.C. 1555, 1563	27
The Aquitania (D.C.N.Y. 1926) 14 F2d 456, 1926 A.M.C. 1071, aff'd. 20 F2d 457, 1927 A.M.C. 1320 (2nd Cir. 1927)	12
The Clerco (6th Cir. 1946) 154 F2d 605	24
The District of Columbia (4th Cir. 1935) 74 F2d 977, 103 A.L.R. 768	24

AUTHORITIES (cont.)

	Page
The Marguerite (7th Cir. 1944) 140 F2d 491	19
The Miramar (D.C.N.Y. 1929) 31 F2d 767, aff'd 36 F2d 1021 (2nd Cir. 1929)	12
The Severance (4th Cir. 1945) 152 F2d 916	19
The Silverpalm (9th Cir. 1938) 94 F2d 776	19
Federal Statutes:	
28 U. S. Code Annotated Sec. 1254 (1)	2
46 U. S. Code Annotated Sec. 182	17
46 U. S. Code Annotated Sec. 183	3
46 U. S. Code Annotated Sec. 188	3
Texts:	
Benedict on Admiralty, Sixth Edition 1940	13, 14
Gillmore and Black, *The Law of Admiralty*, 1957	12, 13, 14, 15, 17-19, 20, 23
Miscellaneous:	
48 Am. Jur. *Shipping*, Sec. 568	21

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALBERT E. QUINTON, DAVID H. ZIPERSON, JOSEPH W. H. COOPER, LOUIS VITEL, MERLE BROWN and CAROL BROWN, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 5, 1959.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court (R. 70-75) were not reported. They are appended hereto as appendix A, **infra**. The opinion

of the Court of Appeals (R. 409-420) (**infra**, Appendix C) is reported at 267 F2d 142.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1959 (**infra**, Appendix D). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. Sec 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a proceeding brought pursuant to 46 U.S.C.A. Sec. 183 by an individual owner of a private pleasure yacht for exoneration from, or limitation of liability for injuries caused to claimants, where claimants' answers and proof raise an issue concerning petitioner's personal negligence in the incident giving rise to their losses, the burden of proof of absence of such personal negligence is on the petitioner?

2. Whether, in a proceeding brought pursuant to 46 U.S.C.A. Sec. 183 by an individual owner of a private pleasure yacht for exoneration from, or limitation of liability for injuries caused to claimants, where claimants' answers and proof raise an issue concerning petitioner's personal negligence in the incident giving rise to their losses, the considerations governing proof of negligence or non-negligence are the same as in cases where the petitioning party is the owner of a commercial maritime vessel?

STATUTES INVOLVED

Title 46 U. S. CODE ANNOTATED, Section 183:

"Amount of liability; loss of life or bodily injury; privity imputed to owner; 'seagoing vessel'

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." ***

Title 46 U. S. CODE ANNOTATED, Section 188:

"Limitation of liability of owners applied to all vessels

"Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b—187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters. R.S. Sec. 4289; Feb. 18, 1875, c. 80, Sec. 1, 18 Stat. 320; June 19, 1886, c. 421, Sec. 4, 24 Stat. 80; June 5, 1936, c. 521, Sec. 4, 49 Stat. 1481."

STATEMENT

On January 16, 1957, the yacht, "Ronar", caught fire while docked at Nuta's Yacht Basin on the Miami River, a navigable inland waterway located within the limits of Dade County, Florida. The yacht, "Ronar", was at all times material hereto a pleasure motor yacht built by the Chris Craft Corporation in 1953, fifty-four feet seven inches in length with a beam of thirteen feet, nine and one-half inches, and powered by two diesel engines. (R. 2) The fire spread rapidly to vessels docked nearby, and to the docks and sheds at Nuta's. In all, extensive damage was caused to nine other vessels, as well as other property at the yacht basin. (R. 3) The owner of the "Ronar", respondent FRANK J. ROONEY, petitioned the United States District Court in and for the Southern District of Florida to take jurisdiction over all claims against him or the "Ronar" arising out of the subject incident of January 16, 1957, pursuant to Sections 4283, 4284, and 4285 of the Revised Statutes of the United States (46 U.S.C.A. Secs. 183, 184 and 185), and the various statutes supplementary thereto and amendatory thereof. (R. 218) The District Court concluded that its jurisdiction was properly invoked. (R. 74)

For the convenience of the Court, we shall refer to the parties as they appeared in the District Court. Albert E. Quinton et al., petitioners here, will be referred to as claimants. Frank J. Rooney, respondent here, will be referred to as petitioner.

In his petition to the District Court, petitioner alleged that he used due diligence to make the "Ronar" in all respects seaworthy and fit for the services in which

she was engaged; that the fire originating aboard the "Ronar" was through no fault of petitioner, his captain or crew; any losses suffered by claimants as a result of the fire were not caused or contributed to by any fault, neglect, want of care or design on the part of the "Ronar", those in charge of her, or petitioner; claimants' losses were occasioned without fault on the part of petitioner, and without his privity or knowledge; claimants' losses were occasioned without the concurrence of any facts within the privity or knowledge of the Master of the "Ronar". Based upon these allegations, petitioner claimed exemption from liability, or in the alternative the benefits of 46 U.S.C.A. Sec. 183, limiting his liability to Four Thousand Five Hundred ($4,500.00) Dollars, the alleged value of the "Ronar" on January 16, 1957, after the fire, and prayed for a decree granting such relief. (R. 2-8) Claimants' answers contraverted the aforesaid allegations, and sought judgment for damages against petitioner and the "Ronar" for the full value of their losses. (R. 12-70)

Petitioner had acquired the "Ronar" early in 1956, and used it until August of that year, when he placed it in dry storage for protection during the storm season. In December, 1956, petitioner decided to make the yacht ready for sea and directed Miami Shipbuilding Corporation to survey her, and give him an itemized list of recommended repairs. He instructed Miami to do anything that they felt should be done, subject to petitioner's approval of the cost. However, the entire list of recommended repairs submitted by Miami to petitioner was approved, with the single exception of painting and varnishing which was to be handled by the captain. (R. 122-123, 132-134) Petitioner enlisted the aid of Howcroft, a long-time friend, to look after details of the repair work, (R.

124) and hired Lancaster, a qualified captain, to make the yacht seaworthy and operational. (R. 124, 96, 98)

Most of the repair work was completed in January, 1957, when the yacht was taken under its own power to Nuta's Yacht Basin by Capt. Lancaster. (R. 214-215, 99) It lay there for three days while Lancaster painted and varnished and Miami made additional repairs. (R. 99-101, 239) Lancaster had taken charge of the yacht about five days before when it was launched for the first time at Miami. (R. 106, 243) Upon taking charge of the vessel, the captain observed that the batteries were dead, and that the electric toilets and electric pumps were not functioning. (R. 245) Capt. Lancaster authorized Miami's electrician to repair the latter units, which was accomplished. (R. 97-99, 250-251)

Lancaster testified that petitioner advised him that there had been a previous fire in the electrical system, and that Howcroft and Baker, Miami's electrician, advised him similarly. The place where the previous fire had broken out was marked by charred wood and replaced wiring. (R. 107-108)

Capt. Lancaster observed that each night that the "Ronar" was in the water, five nights while at Miami and three at Nuta's, the batteries became discharged so that they were dead the next morning, despite the fact that during the day the boat was powered by shore current and the batteries were not used at all. (R. 238-242) The "Ronar" contained an expensive device known as a battery charger which was connected to the shore current and then to the batteries. It was self-regulated, so that when the batteries reached their maximum charge it auto-

matically shut off. (R. 111-112) The charger would be disconnected about 4:30 P. M. each day. (R. 240) Nevertheless, the eight days that the yacht was in the water at Miami and at Nuta's, the batteries became discharged at night and were dead the next morning. There was no known load on the batteries during the night, nor during the day since the vessel was then powered by an extension line connected to shore current. (R. 238-242) Based on his experience with batteries, the captain testified that this might indicate either a short circuit in the wiring which would use up the charge, or simply that the batteries were too old to retain a charge. (R. 242-243) Lancaster could not recall whether he told petitioner or Howcroft of the battery problem. (R. 243) Both Howcroft and petitioner testified that they could not recall him doing so. (R. 161, 125) Howcroft also testified that had he been so advised, it would indicate to him that a complete wiring check was called for. (R. 165)

Munroe, the general manager at Miami, and Baker, the lead electrician, testified that no visual inspection of the wiring or of any circuit was ever ordered. (R. 221-222, 192) The "Ronar" had been turned over to Miami sometime during August and put in dry storage. (R. 122-123) When the boat first came to Miami, Munroe and his employees went through her to determine what work would be done while she was in storage. Recommended repairs were discussed between Munroe and Howcroft, who relayed the information to Rooney. When finally approved, Munroe or his foremen would issue work orders. (R. 208-211, 159) Some work orders were issued in September, 1956. (R. 216) The work order concerning repair of the wiring damaged by the prior fire was not issued until December 27, 1956, less than three weeks before the

fire. (R. 216) Munroe testified that the damaged wiring was discovered by Howcroft and himself when the boat first came in, (R. 216) presumably in August. No explanation was offered by Munroe for the four-month delay in issuance of the order. (R. 216-217)

However, Howcroft's testimony, corroborated by Baker, was that the damaged wiring was not discovered, and Miami not made aware of the previous fire, until just prior to the time the yacht was taken from Miami to Nuta's, or about the time that the work order was issued. The damaged wiring was then discovered for the first time by Baker who pointed it out to Howcroft. (R. 155-156)

Munroe testified that the customary procedure where there has been an electrical fire is to physically check out the circuit involved, and that neither petitioner nor Howcroft ever ordered such an inspection. (R. 221-222)

Baker, the lead electrician from Miami, stated that the only check of the wiring made was by voltmeter and ohmeter which would indicate whether or not there was any voltage coming through, (R. 175) and could not reveal whether or not some voltage was escaping because of a short. (R. 270)

Jesse Davis, Chief of the Miami Fire Prevention Bureau, testified that in his opinion a visual inspection of the wiring is the only practice consistent with safety where there has been a previous fire in an electrical system, and that the practice of his bureau has always been to tell the people involved to disconnect the current until

it has been inspected by a competent electrician and repaired. (R. 266) He testified that a meter test of the wire is insufficient. (R. 266, 270)

Hainlin, a professional electrical engineer, stated in response to a hypothetical question assuming the facts testified to concerning the batteries' failure that, in his opinion, the discharge of the batteries for five days could only mean that, "there is a source or circuit external to the battery system discharging these batteries, *** what is commonly called a short." (R. 273-277)

His opinion was corroborated by Baker, petitioner's own witness, who testified that he checked the batteries with a hydrometer, voltmeter, and battery tester to see if they were "in working shape." He concluded that the batteries were satisfactory for their intended use, thus negativing the "old-age" theory. (R. 178)

Chief Davis, testifying in response to a hypothetical question assuming facts previously testified to stated that it was his conclusion that the cause of the fire was electrical. (R. 267-270)

All of the testimony tended to negative arson, spontaneous combustion or vandalism as possible causes. Lancaster testified that the day before the fire he sanded and scraped the cabin to prepare it for painting. He did no painting or varnishing that day, however, but did use a non-inflammable type of paint remover. There were no soiled or greasy rags left on the boat. He finished about 4:30 P. M., inspected the entire vessel for cigarettes, matches, or things of that nature, found nothing, locked the wheel house with a secure lock and left. (R. 101-104)

Lancaster hired Garcia to do some of the cleaning and painting. He assisted Lancaster the day before the fire with the sanding, scraping and paint removing. He replaced the closed containers of paint remover in a rope locker. Any rags used by him were thrown over the side. Unused rags were put back into a rag bag and placed in a pasteboard box inside the wheelhouse. (R. 101, 138-(R. 278-279)

Tryon, an inspector from the Miami Fire Prevention Bureau, inspected the remains of the vessel after the fire and eliminated arson and vandalism as possible causes. (R. 278)

Based upon the foregoing facts, the District Court found that the fire was caused by defective wiring of the "Ronar"; that petitioner and his agent, Captain Lancaster, were negligent in failing to maintain the wiring in safe condition, and that such negligence was the proximate cause of claimants' injuries. (R. 72-73) It concluded that the Limitation Statute, 46 U.S.C.A. Sec. 183 did not confer any right to limitation upon petitioner, nor was petitioner entitled to exoneration from liability. (R. 74-75) Damages were assessed at a total of Thirty-Three Thousand Two Hundred and Twenty and 14 100 ($33,220.14) Dollars, and a final decree awarding damages to claimants was entered on February 28, 1958. (R. 75-76) Petitioner filed his Notice of Appeal to the Court of Appeals for the Fifth Circuit on March 11, 1958.

On appeal, respondent contended that he was without privity or knowledge, had exercised due diligence, and that there was insufficient proof to support the District Court's findings as to the origin and cause of the fire. The

Court of Appeals reversed the District Court and entered judgment for respondent, holding that the lower court's decision that respondent was negligent, and that the fire resulted from defective wiring, was "clearly erroneous." (R. 409-421)

Contending that the decision of the Court of Appeals conflicts with decisions of this Court, and of the Courts of Appeal and District Courts, and involves an important question of federal law, *viz.*, construction of the phrase "knowledge or privity" in proceedings under the Limitation Statute brought by owners of private pleasure yachts, which has not been, but should be settled by this Court, claimants now seek review of the Court of Appeals' decision by this Court.

Reasons for granting the writ

1. The instant decision of the Court of Appeals for the Fifth Circuit brings to the fore a recurrent problem of contemporary federal admiralty law, upon which this court has issued no clear directive. Broadly stated, the proposition is simply whether the singular protection afforded to owners of seagoing vessels by the Limitation of Liability Act, 46 U.S.C.A. Sec. 183 et seq., is to be extended equally as liberally to owners of private pleasure yachts as to owners of commercial vessels. The purpose of the Act of 1851 had been stated by this court to be the encouragement of shipbuilding and the investment of capital in that industry by limiting the liability of vessel owners to their interest in the adventure. *British Transport Commission vs. U. S.* (U. S. 1957) 354 U. S. 129, 77 S. Ct. 1103, 1 L. Ed. 2d 1234; the incentive being the then inferior competitive position of American shipping as respects England and

continental Europe. *Moore vs. American Transportation Co.* (U.S. 1861) 65 U.S. 1, 24 How. 1, 16 L. Ed. 674, Gilmore and Black, *The Law of Admiralty*, Sec. 10-3, p. 666. Most of the motivating purpose of the Act no longer prevails. See Justice Black in *Maryland Casualty Co. vs. Cushing* (U.S. 1954) 347 U.S. 409, 437, 74 S. Ct. 608, 623, 1954 A. M. C. 837, 859. Petitioners do not now assert that the Act is inapplicable to the respondent; *Corgell vs. Phipps* (The Seminole) (U.S. 1943) 317 U.S. 406, 63 S. Ct. 291, settled that matter. Petitioners do most strenuously assert that the construction to be given to the heart of Sec. 183, the phrase, "privity or knowledge" should be stricter in cases of owners of private pleasure yachts than those where the intended beneficiaries of the federal protection are petitioning.

A fire breaks out about a twenty-three foot Chris Craft pleasure yacht docked at a crowded yacht basin. Life is endangered; property is destroyed. If the fire was due to the negligence of the yacht owner or his agent, injured parties have a right of action for their damages in the local court. If, however, the amount of damages exceeds the value of the boat after the fire the owner has a right to have a U. S. District Court sitting in Admiralty determine whether or not there was any negligence at all, and if so, whether or not the owner was "without privity or knowledge" of such negligence. *The Aquitania* (D.C.N.Y. 1926) 14 F2d 456, 1926 A.M.C. 1071, affirmed 20 F2d 457, 1927 A.M.C. 1320 (2nd Cir. 1927) Both trial by jury and application of the standard tort doctrine of respondeat superior are denied to the claimants. Elements of negligence, proximate cause and other substantive tort issues are determined by federal maritime law rather than the lex loci. *The Miramar* (Petition of Statler) (S.D.N.Y.

1929) 31 F2d 767, aff'd, without opinion 36 Fed 1021 (2nd Cir., 1929) This court, pursuant to congressional directive, has extended the benefit of these protections to private yacht owners. *Corgell vs. Phipps, supra.* We ask the court to now rule on the quantum of proof of negligence that will be required of claimants in pleasure yacht cases, as opposed to the quantum of proof required in commercial maritime cases, in terms of placing the burden of proof of the issue of petitioner's personal negligence, and in terms of satisfaction of that burden by the party charged therewith.

It is clear that the burden of proof of absence of privity or knowledge is on the petitioner. *Corgell vs. Phipps, supra, Kutger vs. U. S.* (D.C. Fla. 1958) 169 F. Supp. 104, 3 Benedict, *Admiralty*, Sec. 489, p. 378, Gilmore and Black, *supra*, Sec. 10-25, p. 705.

The burden of proof of negligence and the grounds upon which liability is based is generally on the claimants, although the law here is unsettled. *Petition of Moore-McCormack Lines, Inc.* (D.C.N.Y. 1957) 147 F. Supp. 816, *Petition of Skibs a s Jolund* (D.C.N.Y. 1956) 144 F. Supp. 47, rev'sd. 250 F2d 777 (2nd Cir. 1957), *Petition of Martin* (D.C. Pa. 1951) 102 F. Supp. 43. See also Gilmore and Black, *supra* Sec. 10-25, p. 705.

The above-stated rules conflict however in a situation illustrated by the instant case—where the negligence relied upon by the claimants is the failure of the owner to avail himself of knowledge at his disposal which could have avoided the disaster. So where it is asserted that the owner knew of a potential fire hazard and failed to take necessary affirmative action, the issues of privity or knowledge and negligence cover identical grounds.

Privity or knowledge was early defined as follows:

> "As used in the statute, the meaning of the words 'privity or knowledge', evidently is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it." *Lord vs. Goodall S.S. Co.* (9th Cir. 1877) 15 Fed. Cas. No. 8506, aff'd. (U. S. 1880) 102 U. S. 541, 26 L. Ed. 224.

This definition has generally been followed. See 3 Benedict, *supra*, Sec. 489, pp. 379-380. It has also been advanced that, "privity or knowledge and design or neglect are phrases devoid of meaning. They are empty containers into which the courts are free to pour whatever content they will. The statutes might quite as well say that the owner is entitled to exoneration from liability or to limitation of the liability if, on all the equities of the case, the court feels that result is desirable; otherwise not." Gilmore and Black, *supra* Sec. 10-20, p. 695.

In the instant case, claimants relied below on petitioner's personal negligence, his "privity or knowledge" in knowing or having the means to know that a fire caused by a short circuit in the electrical system of the yacht had previously occurred, and his failure to take reasonable affirmative steps to determine whether the electrical system was still defective upon discovering or having means to discover that the vessel's batteries were failing each night without apparent cause.

In reversing, the Court of Appeals held that there was insufficient proof that the wiring was defective, and that this was the cause of the fire. At best, it ruled, such conclusions were purely speculative and conjectural. The court wrote:

> "We think that the evidence is without substantial dispute and that it is sufficient only to warrant speculation or conjecture that claimants' explanation of the fire was the correct one; and that it is not of sufficient probative value to establish the negligence upon which claimants rely to sustain their claims for damages."

No doubt, the burden was upon the claimants to prove that the fire was in fact caused by the defective wiring. The burden of proof of proximate cause, without which there is no liability, is concededly on the claimants. However, the Court of Appeals went further and viewed the proof below as if the burden of both the issue of petitioner's negligence and its causual connection with claimants' damages were on claimants, contrary to the meaning and intent of Congress, as construed in *Coryell vs. Phipps*, *supra*, and cases cited therein. See also Gilmore and Black, *supra*, Sec. 10-25, p. 705 at footnote 106.

In *Coryell vs. Phipps*, *supra*, Mr. Justice Douglas, writing for the court, stated:

> "Thus respondent has satisfied the burden of proof, which is on those who seek the benefit of Sec. 4283 (i.e., Sec. 183) of establishing the lack of privity or knowledge."

In the instant case the District Court held that petitioner had failed to satisfy this burden. The Court of Appeals reversed, holding that claimants' evidence was insufficient to sustain the decision of the lower court. It reasoned that claimants failed to sufficiently prove petitioner's negligence and that his negligence proximately caused the fire which destroyed claimants' property.

The District Court found that petitioner and his agent, Capt. Lancaster, were negligent in failing to maintain the wiring in safe condition. (R. 72-73) Petitioner's negligence consisted of his failure to use due diligence to remedy the dangerous condition of the wiring, as required because of the previous fire and constantly run-down batteries. He was "charged with knowledge that his vessel was unseaworthy and was because of such condition a potential fire hazard as respect to other vessels moored alongside. Having such knowledge, he and his agents failed to take such steps as were necessary to make the vessel seaworthy, or safe for the purposes of mooring within a crowded yacht basin." (R. 74) The court held:

> "The owner of a vessel has a non-delegable duty to use due diligence in maintaining his vessel in a seaworthy and safe condition, and further no limitation or exoneration will be allowed when the individual owner has delegated broad general powers to his personal agent in the supervision and maintenance of a vessel, and such agent fails to exercise due diligence in repairing the vessel." (R. 74-75)

It concluded that the provisions of 46 U.S.C. Sec. 183 do not apply to petitioner because he was not "without privity or knowledge" of the actionable negligence. (R. 74)

By reversing for insufficiency of evidence to support the District Court's finding that petitioner was not "without privity or knowledge" within the meaning of 46 U.S.C.A. Sec. 183, because the evidence was too speculative or conjectural to "justify an inference of the stable and dependable quality necessary to support a conclusion upon which a judgment can be founded," (R. 411) the Court of Appeals, in effect shifted the burden of proof of petitioner's negligence to claimants, contrary to this court's decision in *Coryell vs. Phipps, supra*, and the several lower court cases cited therein.

In so holding, the Court of Appeals extends to Sec. 183 a conflict of authority that has long existed in cases construing the meaning of the "Fire Statute," 46 U.S.C.A. Sec. 182, which provides:

> "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

"Design or neglect" and "privity or knowledge" are synonymous terms. Gilmore and Black, *supra*, Sec. 10-21, pp. 697-698. The conflicting authorities are collected and discussed in the following passage from Gilmore and Black, *supra*, Sec. 10-25, pp. 705-706, at footnote 106:

> ". . . There is no reason why the burden of proof rule should be different in fire statute cases from

what it is in limitation cases. Thus in the Arthur N. Herron (Petition of American Dredging Co.), 235 F.2d 618, 1956 A.M.C. 1803 (3d Cir. 1956) the Court said, in a per curiam opinion: 'The district court properly held that in order to entitle it to exoneration [under the fire statute] the burden of proof was upon the petitioner to show that the disaster was not due to its fault or the fault of the master or crew or the unseaworthiness of the vessel.' (The statement quoted does not appear to be supported by authority insofar as it suggests that the petitioner for limitation or exoneration bears the burden of proof on the entire case.) However, the shift from 'privity or knowledge' to 'design or neglect' has led to some confusion in the fire statute cases. Thus the statement is made in 3 Benedict, Admiralty (Cum.Supp. 1955) 47 that under the fire statute 'the burden of proof that the fire was caused by the design or neglect of the owner is on the libellant', citing Hoskyn & Co. v. The Silver Line, Ltd., 143 F.2d 462, 1944 A.M.C. 895 (2d Cir. 1944), certiorari denied 323 U.S. 767, 65 S.Ct. 116 (1944); Fidelity-Phoenix Fire Ins. Co. v. Flota Mercante Del Estado, 205 F. 2d 886, 1953 A.M.C. 1348 (5th Cir. 1953); Connel Bros. Co. (Canada) Ltd. vs. Sevenseas Trading & S. S. Co., 111 F.Supp. 227, 1953 A.M.C. 837 (N.D. Cal. 1953). (In the Connel Bros. case, exoneration was denied and both the shipping company and its manager were held liable to the libellants. The holding was reversed as to the manager in Stralla v. Connel Bros. Co. (Canada) limited, 220 F. 2d 511, 1955 A.M.C. 835 (9th Cir. 1955).)

> There is indeed language in the opinions to justify the commentator's statement. It is believed that the rule should be as in the limitation cases: burden on the libellant to show negligence or fault; burden on the owner to show his (personal) freedom from 'design or neglect'. No doubt the conjunction of the terms 'neglect' and negligence' has stimulated the suggestion that in fire statute cases the libellant bears the burden on both aspects of the case."

To now permit owners of private pleasure yachts to have advantage of the numerous benefits implicit in the Limitation Act by simply alleging compliance therewith and casting upon parties injured the burden of proving non-compliance would grossly distort the congressional purpose and would add a major new uncertainty to an already self-contradictory body of law. The rule that the petitioner has the burden of proof of absence of privity or knowledge is now established. *Coryell vs. Phipps, supra, Austerberry vs. U. S.* (6th Cir. 1948) 169 F2d 583, *The Severance* (4th Cir. 1945) 152 F2d 916, *The Marguerite* (7th Cir. 1944) 140 F2d 491, *The Silver Palm* (9th Cir. 1938) 94 F2d 776, *Petition of Boat Demand, Inc.*, (D.C. Mass. 1958) 160 F. Supp. 833, *Kutger vs. U. S.* (D.C. Fla. 1958) 169 F. Supp 104. There can be no serious dispute that petitioner's personal negligence and his "privity or knowledge," the statutory words of art, are one and the same.

We submit therefore that the instant decision of the Court of Appeals for the Fifth Circuit is squarely in conflict with the cases last-cited, and that upon this ground the writ should be granted and the decision below reversed.

2. The reason most strongly relied upon for granting of the writ is that the Court of Appeals, in weighing the evidence to determine its sufficiency, failed to consider that the petitioning party was a pleasure yachtsman, and applied false and erroneous construction to the phrase "privity or knowledge." As Gilmore and Black, *supra*, Sec. 10-23, pp. 700-701 point out:

> "Most of the recent individual ownership cases involve pleasure yachts and owners who are amateur yachtsmen. The Limitation Act, originally passed to afford a measure of relief to a hard-pressed and highly competitive industry, has become a charter of irresponsibility for a few wealthy individuals. The individual owner of, say, a small fishing vessel which explodes in port may well find himself liable to respond in damages under circumstances where the absentee yacht owner will go free. No theory can justify the results reached in *Coryell vs. Phipps* [*supra*] or the *Trillora* [(Petition of Guggenheim), 76 F. Supp. 50, 1948 A. M. C. 132 (E.D.S.C. 1947)] under which the owner of yacht or speed boat, who is provident enough to hire someone else to run the boat for him, is granted a general license to kill and destroy. The Limitation Act covers any sort of 'vessel' from a row boat up, and restriction of its coverage to commercial enterprises could be achieved only by amendment. Nevertheless the very vagueness of the 'knowledge or privity' phrase leaves a wide area for judicial construction; a more liberal construction of the phrase in the individual ownership cases than the precedents suggests would be desirable."

Limitation of liability being in derogation of the common law should not be construed to abridge the rights of injured parties to a greater extent than the language used will fairly warrant, or to limit the right to a recovery beyond what is necessary to effectuate the purpose of Congress. 48 Am. Jur. *Shipping* Sec. 568 p. 398.

A typical case is *In re Reading's Petition* (D.C.N.D. N.Y. 1958) 169 F. Supp. 165, where the court, bound by precedent, granted exoneration to the owner of a 26 foot Chris Craft semi-cabin cruiser which had exploded on Lake George, an inland New York lake, commenting:

> "It is difficult to apply sensibly the prime and important principle declared inherent in this Act, namely to encourage investment in American Shipping, and reason what a significance an explosion of a motor boat of a well-to-do owner upon an inland lake bears to the safeguarding of such fine objective."

The court went on to cite the language of Mr. Justice Black in his dissent in *Maryland Casualty Co. vs. Cushing* 347 U.S. 409, 432, 74 S. Ct. 608, 621:

> "But neither the Act or its history indicates a purpose to encourage investment in insurance companies by limiting their liabilities."

We contend that it is incumbent upon the judiciary to administer the Act in light of its language and purpose, and not to dispose of issues without reference thereto. In the instance case, the Court of Appeals in considering the correctness of the decision it was reviewing, failed to

pay heed to this basic principal of statutory construction, in the following regard:

1. In determining whether or not petitioner was "without privity or knowledge" of the negligence giving rise to the loss, the court did not consider the District Court's conclusion that petitioner failed to bring himself within Section 183 by virtue of his constructive knowledge that the yacht was a fire hazard. The District Court held: (Conclusion of law No. 4, R. 74)

> "Although an inspection was made of the wiring system upon orders of petitioner, petitioner or his agents did not use due diligence to remedy the dangerous condition, as required because of the previous fire and constantly run-down batteries. The owner of a vessel has a non-delegable duty to use due diligence in maintaining his vessel in a seaworthy and safe condition, and further, no limitation or exoneration will be allowed when the individual owner has delegated broad general powers to his personal agent in the supervision and maintenance of a vessel, and such agent fails to exercise due diligence in repairing the vessel."

Such a holding is consistent with the dicta of the Supreme Court in *Coryell vs. Phipps, supra*, at 317 U.S. 410-412, 63 S. Ct. 293-294, where the court cited two Court of Appeals cases as illustrative of the proposition that "the scope of authority delegated by an individual owner may be so broad as to justify imputing privity . . . as well as knowledge." *In re New York Dock Co.* (Converse & Co.), 61 F2d 777, 1932 A.M.C. 1492 (2d Cir. 1932), and *In re*

Great Lakes Transit Corp. (The Glenbogie) 81 F2d 441, 1936 A.M.C. 267 (6th Cir. 1936).

The District Court's holding was based upon evidence that petitioner had delegated broad general authority to Howcroft and Lancaster, and had completely removed himself from the repair and fitting out of the "Ronar" from the time he turned it over to Miami until the fire. As the Court of Appeals pointed out, petitioner did not see the yacht from November, 1956, (approximately when the repair work commenced) to the fire. (January 15, 1957.) (Appendix C p. R. 412). Howcroft learned of the previous fire about December 27, 1956, when going through the boat with Baker, Miami's electrician. (R. 155-156, 216) Lancaster found out about the previous fire when he took charge of the yacht, approximately ten days later. (R. 107-108) Lancaster knew of the battery problem, (R. 238-243, 111-112) and Howcroft testified at trial that its significance was apparent to him and called for an inspection of the wiring system to check for shorts. (R. 165) It is clear that Lancaster and Howcroft were petitioner's alter ego from November, 1956, to the day of the fire, so far as the repair work was concerned.

We submit, therefore, that the holding of the District Court in this regard was proper, in view of the liberal construction of the knowledge or privity phrase tacitly approved by this court in the previously-cited dicta from *Coryell vs. Phipps*, and urged by modern commentators in cases involving individual owners of private pleasure yachts: Gilmore and Black, *supra*, Sec. 10-23, pp. 698-701.

The decision of the Court of Appeals gives the private yachtsman legal sanction to absent himself from his yacht,

employ others, and thus avoid all responsibility for damage caused by the failure of his employees or agents to make the yacht seaworthy. Congress certainly never intended to grant such sweeping immunity to yachtsmen, nor to bless insurance companies with such convenient means of avoiding their liability.

2. In determining whether or not the District Court's finding that the fire was caused by defective wiring was "clearly erroneous," the Court of Appeals again failed to view the evidence in light of the congressional purpose. It departed also from those canons of appellate review in admiralty cases which place a heavy presumption upon the findings of the trial court where there is a conflict of evidence or a possible lack of veracity involved. See, i.e., *The District of Columbia* (4th Cir. 1935) 74 F2d 977, 103 A.L.R. 768, *The Clevco* (6th Cir. 1946) 154 F2d 605, *Lockwood Boat and Motors vs. Rockwell* (8th Cir. 1957) 245 F2d 306, *Gosnell vs. U. S.* (4th Cir. 1959) 262 F2d 559.

To begin with, the Court of Appeals clearly erred when it stated: (R. 413)

> " . . . It was undisputed that Miami was advised by appellant and his close friend, Howcroft, who assisted in preparing the 'Ronar' for use that some wires had shorted in the engine room. . . . "

The testimony of Baker and Howcroft, petitioner's own witnesses, was that neither petitioner or Howcroft ever told Miami about the previous fire, and that it wasn't until shortly before the launching at Miami's Shipyard that the previous short circuit and fire was discovered. (R. 155-156) Baker testified that he saw it while going through

the boat for a final check with Howcroft. Baker testified on direct examination: (R. 174)

> "The boat was there (at Miami's shipyard) a couple of months, and Mr. Howcroft came over a few days before the boat was ready to be taken off the ramp and he asked me to check it with him. We walked in there and he wanted to see that it was all right, a regular routine, and then I happened to notice a few little wires in the corner and I called his attention to it and he said, 'You should have a box on that.' It looked like it was scorched a little bit and John said, 'Go ahead and fix it.' We went ahead and fixed it. . . ."

Baker was the most damaging witness for petitioner. He testified without hesitation being merely an employee of the shipyard, (R. 174) and thus having no interest in the outcome of the trial. He testified that he checked the wiring with a voltmeter and ohmeter when he saw the previous short, which would not determine whether or not there were any other shorts in the system. (R. 175. See testimony of Hainlin R. 273-277)

This is not the proper place to review the testimony in detail. We submit that this court should exercise its discretionary review by certiorari because of the major error committed with respect to placing of the burden of proof of absence of privity or knowledge, and because of the state of confusion of federal law concerning the scope and extent of private yacht owners' right to limitation of liability. But the decision of the Courts of Appeals on the facts alone is unjust, and is itself "clearly erroneous." The

inescapable proposition, when all is said and done, is that a reasonably prudent yacht owner exercising due diligence to make his yacht seaworthy is required to order a thorough inspection of his wiring system, when he knows that it has once caught fire, and when after being three months in a shipyard the charge in its batteries is mysteriously drained off every night that it is in the water, without any known load being placed upon it. The Court of Appeals makes much of the fact that Baker replaced the damaged wiring and installed a junction box. It takes no electrical specialist to realize that when a system is short circuiting changing a fuse doesn't help it. How could the court reasonably conclude that "whatever danger may have been occasioned by the wiring defect had been completely remedied?" (R. 413)

The Court of Appeals dismissed the battery question as old age. This evidence was conflicting. Lancaster said it might be old age, or that it might be due to short circuiting. (R. 242-243) Hainlin, an experienced electrical engineer, ruled out old age because the batteries became fully discharged each night, despite the fact that they were fully charged from shore current each day. (R. 273-277) Old batteries may not hold a charge too well, but old age alone couldn't wear down a freshly-charged battery over night. Baker, again, testified that the batteries were checked out with a hydrometer and were found to be in working shape. The weight of the evidence here was heavily in favor of claimants' position.

The Court Of Appeals refused to attach credence to opinion evidence of claimants' experts, based upon facts proven at trial, facts which have been set out at some length in this Petition. It is true that the experts called

on behalf of petitioner were unanimous in their opinion that the origin of the fire could not be determined. Their opinions were based upon the "Ronar's" wreckage, which failed to identify its occasion of destruction. (The yacht was a total loss, R. 105) Chief Davis a fireman of thirty-two years experience, and a lecturer on fires (R. 262-263) was asked a hypothetical question assuming evidence of the "Ronar's" electrical history and activities aboard her the day before the fire. His conclusion based upon these assumptions was that the fire was from electrical causes.

Both sets of experts agreed that reckoning the origin of a fire is an inductive process, calling for elimination of the least likely causes; arriving at a conclusion of the most likely. (R. 267, 292, 317)

The District Court weighed the circumstantial evidence of causation and the experts' opinions. It concluded that the cause was defective wiring, and held that claimants had satisfied their burden of proving proximate cause. Such decision we submit was based upon sufficient competent evidence to sustain it under the rule announced in *McAllister vs. U.S.* (U.S. 1954) 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed.20, interpreting Rule 52(a), Fed.R.Civ.P. Cf. *The Advance* (2nd Cir. 1930) 43 F2d. 824, 828, 1930 A.M.C. 1955, 1563 for comment of L. Hand, J. on review of expert testimony.

This court is traditionally slow to exercise its discretionary power of review where the decision below is wrong, but its consequences affect only the particular litigants. On occasion it will do so in cases not dissimilar to the present. In its most recent term the court reviewed and reversed (three judges dissenting) where the District Court had found a vessel unseaworthy, and the Court of

Appeals held such finding to be "clearly erroneous," this court holding that there was ample evidence to support the finding of unseaworthiness. *Crumady vs. The Joachim Hendrik Fisser* (U.S. 1959) 358 U.S. 428, 79 S. Ct. 445, 3 L. Ed. 2d 417.

The instant decision, however, is sweeping in its effect on the limitation protection granted by Congress to pleasure yachtsmen. It goes too far. Boat owners such as the respondent here are given, in the words of Gilmore and Black, "A general license to kill and destroy." *Supra*, p. 700. The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT E. QUINTON
JOSEPH J. RUPPONER
C. H. KESINGER
LOUIS VITEL
DAVID H. ZIPERSON
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APPENDIX A

FINDINGS OF FACT

1. Petitioner Frank J. Rooney was at all times pertinent to this case the owner of the yacht "RONAR", No. 18 L 1886, which on the 16th day of January, 1957, was docked on the Miami River within the limits of Dade County, Florida.

2. The yacht "RONAR" had been purchased by petitioner in 1956, and for a period of time prior to its loss, had been kept in dry storage at the Miami Shipbuilding Corporation. In December, 1956, petitioner Frank J. Rooney ordered the Miami Shipbuilding Corporation to survey the vessel, check its condition and put the vessel in order, and return it to the water. Captain William Lancaster, an experienced Captain was hired by petitioner as master of the yacht.

3. There was evidence that there had been a fire in the electrical system of the vessel prior to it being placed in dry storage, and there was further evidence that her electrical system had deteriorated. Prior to returning the vessel to the water, an employee of the Miami Shipbuilding Corporation checked its wiring with a voltmeter, but no complete visual inspection was made nor was the wiring checked out from the place of the former short and fire. The Miami Shipbuilding Corporation made various other repairs including the installation of a refrigerator pump and bilge pump, and checking of the engines.

4. Following the work on the vessel at Miami Shipbuilding Corporation, the vessel was returned to the

water, and moved under its own power to Nuta's Yacht Basin, where various employees of Miami Shipbuilding Corporation and other continued repairs. Work was begun to scrape and revarnish parts of the vessel.

5. Assisting Captain Lancaster was Mr. John Howcroft, a friend of Mr. Rooney's and experienced in the operation and maintenance of small craft. He testified that Mr. Rooney ordered the vessel put in shape. Mr. Rooney, however, did not personally supervise the work on the vessel.

6. Prior to and after the vessel was docked at Nuta's Yacht Basin, difficulty was experienced in keeping the batteries charged. For five consecutive nights the batteries became discharged, sufficient to require recharging. There was testimony that this indicated a short circuit somewhere in the electrical system.

7. On the morning of January 16, 1957, the yacht "RONAR" caught fire and burned. The fire spread rapidly and caused considerable damage to the property and the vessels of the claimants in this cause.

8. The evidence shows that the fire began in the saloon of the vessel. Although there are many theories as to the cause of the fire, the Court finds that the fire was caused by defective wiring of the vessel.

9. The petitioner and his agent Captain Lancaster were negligent in failing to maintain the wiring of the vessel in a safe condition, and such negligence was the proximate cause of the injury to claimants herein.

10. The fire aboard the "RONAR" caused the following damage to nearby vessels and docks:

a. Damage to Nuta's Yacht Basin, caused by the spread of the Ronar's fire amounted to $15,119.00. This included damage to piling and structure.

b. Damage to the vessels Dorothy and Ruptured Duck, owned by Louis Vitel, was in the amount of $3,600.00. In addition personal property in the value of $1,800.00 owned by Louis Vitel, and kept aboard the vessel Dorothy was destroyed by the fire.

c. The vessel Buzz and Carol owned by Merle and Carol Brown was damaged to the extent of $500.00.

d. The vessel Sally Ann, owned by David Ziperson, was damaged to the extent of $1,321.34.

e. The vessel Cheryl Ann, owned by C. H. Kesinger, was damaged to the extent of $250.00.

f. The vessel Playmate, owned by W. H. Cooper, was damaged to the extent of $250.00.

g. The yacht Guppy II, owned by A. E. Quinton was damaged to the extent of $8,900.00.

h. The yacht Estelita, owned by D. H. Nicewinter was damaged to the extent of $1,000.00.

i. The vessel Jadron, owned by Joseph Rupponer was damaged to the extent of $480.00.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The provisions of 46 U.S.C. Sec. 183 generally provide that the liability of the owner of any vessel for any loss occasioned without the privity or knowledge of the owner of said vessel shall not exceed the value or amount of the interest of such owner in such vessel.

3. That aforecited statute does not apply in this case. The petitioner Rooney was charged with knowledge that his vessel was unseaworthy and was because of such condition a potential fire hazard as respect to other vessels moored alongside. Having such knowledge, he and his agents failed to take such steps as were necessary to make the vessel seaworthy, or safe for the purposes of mooring within a crowded yacht basin.

4. Although an inspection was made of the wiring system upon orders of petitioner, petitioner or his agents did not use due diligence to remedy the dangerous condition, as required because of the previous fire and constantly run-down batteries. The owner of a vessel has a non-delegable duty to use due diligence in maintaining his vessel in a seaworthy and safe condition, and further, no limitation or exoneration will be allowed when the individual has delegated broad general powers to his personal agent in the supervision and maintenance of a ves-

sel, and such agent fails to exercise due diligence in repairing the vessel.

5. The petitioner Frank J. Rooney is not entitled to exoneration from liability or limitation of liability in the foregoing case. Claimants herein are entitled to recover those damages as stated in finding number ten.

APPENDIX B

FINAL DECREE

The Court having entered the above Findings of Fact and Conclusions of law, it is hereby

ORDERED and DECREED that Petitioner Frank J. Rooney, be and the same is hereby denied exoneration from or limitation of liability for those damages caused by the fire aboard his yacht "RONAR" on the morning of January 16, 1957.

FURTHER ORDERED AND DECREED that the following claimants be and the same are hereby awarded final judgment in the following amounts against the petitioner Frank J. Rooney.

a. To Mr. Louis Nuta, owner of Nuta's Yacht Basin, the sum of $15,119.00.

b. To Merle and Carol Brown, owners of the vessel Buzz and Carol, the sum of $500.00.

c. To Louis Vitel, owner of the vessels Dorothy and Ruptured Duck, the sum of $5,400.00.

d. To David Ziperson, owner of the vessel Sally Ann, the sum of $1,321.34.

e. To C. H. Kesinger, owner of the vessel Cheryl Ann, the sum of $250.00.

f. To W. H. Cooper, owner of the vessel Playmate, the sum of $250.00.

g. To A. E. Quinton, owner of the yacht Guppy II, the sum of $8,900.00

h. To D. H. Nicewinter, owner of the yacht Estelita, the sum of $1,000.00.

i. To Joseph Rupponer, owner of the vessel, Jadron, the sum of $480.00.

FURTHER ORDERED AND DECREED that each of said sums to bear interest from date, and for which said sums and each of them let process issue.

DONE AND ORDERED in chambers at Miami, Florida, this 28th day of February, 1958.

/S. Emett C. Choate
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17302

FRANK J. ROONEY,

Appellant,

versus

LOUIS NUTA, ET AL, Claimants,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(June 5, 1959.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: The question presented by this appeal is whether the record contains evidence sufficient to support the finding of the lower court, sitting without jury, that appellant Rooney was not entitled to limitation of liability or to exoneration as prayed for in his petition filed under 46 U.S.C.A. §§ 181, et seq. Appellant was the owner of the yacht "RONAR", which

burned in the early morning of January 16, 1957 while docked at Nuta's Yacht Basin, Miami, Florida, when fire broke out aboard it causing damage, not only to the yacht, but to Nuta's Basin and to certain vessels situated in the vicinity. The trial court entered its findings of fact and concluded that the statutes providing for limitation of liability and exoneration did not apply[1] and

[1] "3. There was evidence that there had been a fire in the electrical system of the vessel prior to it being placed in dry storage, and there was further evidence that her electrical system had deteriorated. Prior to returning the vessel to the water, an employee of the Miami Shipbuilding Corporation checked its wiring with a voltmeter, but no complete visual inspection was made nor was the wiring checked out from the place of the former short and fire. The Miami Shipbuilding Corporation made various other repairs including the installation of a refrigerator pump and bilge pump, and checking of the engines.

4. Following the work on the vessel at Miami Shipbuilding Corporation the vessel was returned to the water, and moved under its own power to Nuta's Yacht Basin, where various employees of Miami Shipbuilding Corporation ar[illegible] other continued repairs. Work was begun to scrape and revarnish parts of the vessel.

5. Assisting Captain Lancaster was Mr. John Howcroft, a friend of Mr. Rooney's and experienced in the operation and maintainance of small craft. He testified that Mr. Rooney ordered the vessel put in shape. Mr. Rooney, however, did not personally supervise the work on the vessel.

6. Prior to and after the vessel was docked at Nuta's Yacht Basin, difficulty was experienced in keeping the batteries charged. For five consecutive nights the batteries became discharged, sufficient to require recharging. There was testimony that this indicated a short circuit somewhere in the electrical system.

8. The evidence shows that the fire began in the saloon of the vessel. Although there are many theories as to the cause of the fire, the Court finds that the fire was caused by defective wiring of the vessel."

[2] "4. Although an inspection was made of the wiring system upon orders of petitioner, petitioner or his agents did not use due diligence to remedy the dangerous condition, as required because of the previous fire and constantly run-down batteries. The owner of a vessel has a non-delegable duty to use due diligence in maintaining his vessel in a seaworthy and safe condition, and further,

entered a final decree for the total sum of $33,220.14 in favor of Louis Nuta, owner of Nuta's Yacht Basin, and eight other claimants who owned vessels docked nearby.

Upon the general ground that the findings of the trial court were not supported by sufficient legal evidence to sustain its judgment, appellant appeals praying that we examine the evidence and render judgment in his favor. A careful reading of the evidence and consideration of the applicable law convinces us that the appellant's position is well taken. The facts, as such, are really not in dispute; and under established legal principles we think that, at most, they give rise to speculation and conjecture that the fire upon Rooney's yacht "could" have been caused by his negligence. But they do not justify an inference of the stable and dependable quality necessary to support a conclusion upon which a judgment can be founded.

Appellant had acquired the RONAR early in 1956 and used it for some time, and had put it in dry storage at Miami Shipbuilding Corporation in August, 1956. As found by the court below, in December following, he "ordered the Miami Shipbuilding Corporation to survey the vessel, check its condition, and put the vessel in order, and return it to the water. Captain William Lancaster, an experienced captain, was hired by peti-

no limitation or exoneration will be allowed when the owner has delegated broad general powers to his personal agent in the supervision and maintenance of a vessel, and such agent fails to exercise due diligence in repairing the vessel.

"5. The petitioner Frank J. Rooney is not entitled to exoneration from liability or limitation of liability in the foregoing case. Claimants herein are entitled to recover those damages as stated in finding number ten."

tioner as master of the yacht." Rooney did not see the yacht from November 1956 until the time of the fire. He had been advised that, before he purchased the vessel, there had been a short circuit in the wiring.

The general manager of Miami Shipbuilding Corporation testified along with several of its employees. There is no real dispute between appellant and them as to appellant's statement that he, being a building contractor and not well versed in the care and maintenance of boats, had instructed Miami, a reputable concern which built and repaired vessels, to do everything necessary to put the RONAR in proper and safe condition. The bill rendered by Miami to Rooney and paid by him reduced to specific terms what was ordered and what was done in connection with the electrical wiring.[4]

After Miami had completed most of the work the vessel was returned to the water and moved under its own power to Nuta's Yacht Basin so that the captain

[3] "Q. Mr Rooney, did you know that there had been a previous fire aboard the RONAR?

A A previous captain told me he was in Nassau and that he had a short as I got it from him there was no fire There was a short in the wiring that scorched some paint I asked him what he did about and he said he had fixed it temporarily and that he wanted it rewired I told him to go ahead and have it rewired So far as I know, he had that done and put a new junction box in at that place." [The last three sentences refer manifestly to Captain Lancaster who had been referred to just prior to the quoted question and answer.]

[4] The bill contained these items: "Check batteries disconnect and recharge Check wiring circuits for grounds Check generator for output and charged batteries Repaired hot water heater. Refilled all batteries Changed and installed new terminals as needed. . . . *Repair electrical wiring in engine room starboard side, where damaged by fire* Also, repaired wiring under shower room Check and overhaul (3) toilets as directed by captain " [Emphasis supplied.]

could have it under cover to do some painting. While it was there, Miami sent several of its employees to complete the repairs it had been ordered to make.

The court below based its holding of negligence on appellant's part on the previous "fire in the electrical system" and upon the difficulty which was experienced in keeping the batteries charged. The court stated that, "There was testimony that this indicated a short circuit somewhere in the electrical system." Based upon these findings it concluded that the fire began in the salon of the vessel and "Although there are many theories as to the cause of the fire, the court finds, that the fire was caused by defective wiring of the vessel. And that The petitioner and his agent, Captain Lancaster, were negligent in failing to maintain the wiring of the vessel in a safe condition, and such negligence was the proximate cause of the injury to claimants herein."

A close examination of the idence touching these findings and conclusions of the court will demonstrate that the proof was not of such character as to justify the inference of negligence made by the court. It was undisputed that Miami was advised by appellant and his close friend Howcroft who assisted in preparing the RONAR for use, that some wires had shorted in the engineroom—where the fire did not start—and that the wiring which had been taped temporarily was replaced and a proper junction box installed, and that whatever danger may have been occasioned by this wiring defect had been completely remedied.

The evidence contains intimations, chiefly in questions asked on cross-examination by claimants' attorneys, that possibly Chris Craft, the manufacturer of the RONAR had not, under its general practices, installed in the RONAR wire of the best kind for vessels, but there was no tangible proof of this. Liability in such matters arises, not from failure to attain perfection, but from failure to observe reasonable care. Here the evidence was undisputed that any deteriorated wire was replaced with proper new wire.

The proof which came nearest to furnishing a basis for the court's finding of negligence related to the batteries and their tendency to lose their charge. The quotation from Miami's bill, footnote 4 *supra*, coupled with the testimony of its manager and the appellant, shows that it was instructed to check the batteries and the wiring and make the installations necessary to put them in proper shape, and that his was done. The only evidence of battery trouble was given by Captain Lancaster. He testified that the batteries were placed upon charge during the hours he was on the craft, and disconnected when he departed each afternoon. When he would return in the morning some of the batteries would be run down.

This was chiefly wiring where connections were made with new pumps and with repaired toilets, refrigerators and similar items. There was no proof of any wiring condition which might produce a fire hazard which was not properly corrected by replacing new wire.

The court characterized him as a "double witness." He had been the employee of Rooney but had manifested some animus against appellant and feeling in favor of the claimants based upon his friendship with some of them and upon his opinion which he had expressed that all of them ought to be paid because "after all the boat was fully covered by insurance." He had had trouble with the same insurance company about ten years before the trial.

It was his opinion that the failure of the batteries to hold the charge placed in them was attributable to their age. He further testified that during the two to five days he had been charging the batteries, he was experimenting to see if they were usable since new batteries would run high in cost. The Captain testified upon cross-examination that the tendency of the batteries to lose their charge "could" be indicative to bad wiring.

"The batteries would go down every night, indicating that the batteries were of a certain age, that they wouldn't hold a charge. We assumed the batteries were going dead from age. They were, I guess, about four years old, and usually two years is the life of a battery, three at the most."

On this vital point his testimony will be reproduced.

"Q. You said the batteries leaked. Did that cause the vessel to be unsafe in any way?

A. I don't think I said they leaked.

THE COURT:

He said they ran down.

Q. Did that cause the vessel to be in any way unsafe?

A. It could.

Q. How is that?

A. It could be caused from bad wiring or a short circuit or grounding of some type that would cause them to go down.

Q. You mean you left the boat at 4:30 that afternoon with a possibly unsafe condition, is that what you mean to say?

A. No.

Q. Can you tell me now what you mean to say?

A. The boat was not seaworthy.

MR. ANDERSON:

That's not what I asked.

(The question was read by the reporter.)

A. That's a hard question to answer.

Q. You do your best.

A. Any boat you see anywhere might possibly be unsafe. If I had thought for a minute the boat was unsafe to be left at the dock I wouldn't have left it. I would have taken corrective measures.

THE COURT:

You mean to say so far as you know it was not unsafe but you realized that any boat might be unsafe without the captain not [sic] knowing it?

The claimants attempted to use the testimony of Captain Lancaster concerning the batteries as the basis for hypothetical questions in an attempt to prove that this experience with the batteries was sufficient to put appellant on notice that a probably unsafe condition was indicated. Three expert witnesses were used, Hays, a marine consultant, Davis, Fire Marshal of Miami, and Hainlin, a mechanical and electrical engineer. Hays was asked no question about the condition of the batteries and gave no opinion as to what, if any, connection they might have had with the fire.

Davis gave no direct testimony concerning any causal relationship the batteries might have had with the fire. After several hypothetical questions had been phrased and objected to, he was asked a question calling upon him to give his opinion of the cause of the fire to which he responded: " . . . my assumption would have to be that it was from some electrical cause." Hainlin was queried

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THE WITNESS:

That is correct

THE COURT:

He is clear about it. So far as he knows it was not in unsafe condition but he said it was possible he wouldn't know."

Later, when Lancaster was placed upon the stand by the claimants he stated:

"My first thoughts about the whole thing was the fact the batteries were about four years old, and the fact they had been left in a discharged condition all summer. It was my thought that the the batteries were deteriorated to the extent they wouldn't hold a charge, but we were trying to save the expense of new batteries by giving them a fair chance to come back to life."

"Q. Captain assume that a fire breaks out on a 55-foot Diesel motor yacht on or about 6:00 P.M., January 16, 1957. Assume that this yacht is moored at a yacht basin with no crew aboard. Assume that at 1:30 p.m. the previous day the captain had 'completely checked the vessel for lighted cigarettes or smoldering fires.' Assume that there is no evidence or arson. [after the fire the charred

by hypothetical questions concerning the batteries including the statement that they discharged themselves during the nighttime for five successive nights, and was asked: "Q. Could this cause a fire in the circuit?" And he answered: "It likely could, yes."[10]

That is the closest approach to an answer upon which the finding of the court that the fire resulted from a defect in the electrical system could be based, and we do not think that this answer, together with the others quoted, was sufficient in law to constitute a legal basis

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remains turned up a lock to the salon in unlocked position together with the key, which was also found nearby) and assume that the vessel had been completely locked, and the only windows left open were small portholes in the engine room. Assume that the wheelhouse of the yacht had all its windows closed, and assume there was a pasteboard box in the wheelhouse containing cans of paint and varnish remover and a bundle of clean rags, and assume that the vessel was not struck by lightning. Assume that there had been a previous electrical fire in the wiring system of the yacht and following that fire no visual inspection was made of the circuits but only a meter check.

As a fire prevention expert would you have an opinion as to the cause of that fire?

THE COURT:

There has been no evidence of anything, just a fire not in the wheelhouse but in the salon.

A. I would say that unless the wiring had been checked out by a competent electrician, and not checked out with an ohmmeter which only gives you a reading of the amount of resistance in a wire and not what is wrong with the wire—it just gives the resistance of the wire—with all those things *my assumption would have to be that it was from some electrical cause . . .*" [Emphasis added.]

[10] These responses to hypothetical questions were not so much answers of experts based upon their scientific knowledge or specialized training as they were deductions resulting from the exercise of the witnesses' reasoning powers leading to a certain conclusion because all other hypotheses had, by the questions, been eliminated. They partake, therefore, more of the nature of argument than of testimony.

for the finding. The evidence relied upon established nothing more than a possibility that the recurring discharge of the batteries was caused by a short circuit in the wiring of the vessel. It is not sufficient that the finder of facts is warranted in concluding that the alleged negligent condition could possibly have caused the damage claimed. It is necessary that the proof go further and establish the conclusion as a reasonable probability. *Theriot v. Mercer*, 5 Cir., 1959, 262 F.2d 754; *Deitz v. Greyhound Corporation*, 5 Cir., 1956, 234 F.2d 327; *Geigy Chemical Co. v. Allen*, 5 Cir., 1955, 224 F.2d 110; and *Reuter v. Eastern Airlines*, 5 Cir., 1955, 226 F.2d 443, where we stated: "The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict."

As against this unsatisfactory evidence the record contains the testimony of McClaskey, a marine surveyor, Jones, an independent marine surveyor, Tryon, fire inspector for the City of Miami Fire Prevention Bureau, and Goeriz, a special agent for the National Board of Fire Underwriters, all men of extended experience who, along with certain officials of the City of Miami, made a study lasting several days of the remains of the fire aboard the RONAR and were unable to find any condition which could have contributed to the starting of the fire. In addition to their inspection they conferred with the captain and other persons having knowledge of what had been done aboard the RONAR during the days preceding the fire. The witness Jones, based doubtless upon his finding the salon lock in unlocked position, concluded that the fire was of "incendiary nature." Each of them rejected the

conclusion that the electrical system of the boat had anything to do with the fire.

The parties do not cite many cases and there seems to be no sharp divergence between them as to what the law is.[1]

We think that the trial judge accurately summed up the situation in the comment he made, quoted *supra* footnote 9, while the next to the last claimants' witness was on the stand when he said: "There has been no evidence of anything, just a fire not in the wheelhouse but in the salon;" and when he said later: "It is anyone's guess." We think that the evidence is without substantial dispute and that it is sufficient only to warrant speculation or conjecture that claimants' explanation of the origin of the fire was the correct one; and that it is not of sufficient probative value to establish the negligence upon which claimants rely to sustain their claims for damages. After a careful analysis of the evidence, calling as it does, not for an appraisal of the credibility of the witnesses, but for deductions from proven facts, we feel that the conclusion of law made by the trial court was based upon nothing more substantial than *post hoc ergo propter hoc;* and we are left with the definite and firm conviction that a mistake was committed in the entry of judgment for the claimants. *United States v. U. S. Gypsum Co.*, 1948,

[1] Cf generally Coryell, et al v. Phipps, et al, 1943, 317 U.S. 406, affirming decision of this Court reported in 128 F.2d 702; Pennsylvania Railroad Co. v. Chamberlain, 1933, 288 U.S. 333; Benedict on Admiralty, 6th Edition, Vol. 3, p. 357; Merchants Transport Co. v. Daniel, S. Ct. Fla. 1933, 149 So. 401; Arkin Construction Co. v. Simpkins, S. Ct. Fla., 1957, 99 So.2d 557; The Gothland, 1859, 64 U.S. 491; and The Ellenor, U.S. D.C.S.D. Fla., 1941, 39 F.Supp. 576, affirmed by this Court 125 F.2d 774.

333 U.S. 364; *McAllister v. United States*, 1954, 348 U.S. 19; *C. J. Dick Towing Co. v. The Leo*, 5 Cir., 1953, 202 F.2d 850; and *West v. United States*, 3 Cir., 1957, 246 F.2d 443.

The judgment of the district court is therefore reversed and judgment rendered here in favor of appellant.

REVERSED and RENDERED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

(SEAL)

By CLARA R. JAMES
Deputy

New Orleans, Louisiana

AUG. 13, 1959

APPENDIX D

JUDGMENT

Extract from the Minutes of June 5, 1959

No. 17,302

FRANK J. ROONEY

versus

LOUIS NUTA, ET AL.,

Claimants.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and judgment rendered here in favor of appellant, Frank J. Rooney:

It is further ordered, adjudged and decreed that the appellees, Louis Nuta, and others, claimants, be condemned in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 370

ALBERT E. QUINTON, et al,
Petitioners,
vs
FRANK J. ROONEY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	4
I The Decision Below is Clearly Correct	5
II There is no Conflict of Decision	6
III There is No Important Question of Federal Law	13
IV Whether, in the Event Certiorari is Granted, the Shipowner is Entitled to Limit His Liability	13
CONCLUSION	14

AUTHORITIES CITED

Page

Burnet v. Commonwealth Improvement Co.,
287 U. S. 415, 53 S. Ct. 198 5

Butler v. Boston S.S. Co.,
130 U. S. 527, 9 S. Ct. 612 7

Crumady v. The Joachim Hendrik Fisser,
358 U. S. 428, 79 S. Ct. 445 4

Coryell v. Phipps, 317 U. S. 406 ..... 9, 10, 11

Cruse v. Sabine Transp. Co., Inc.,
5 Cir. (1937), 88 F. 2d 298 7

General Talking Pictures Corp. v. Western Electric
Company, 304 U. S. 175, 58 S. Ct. 849 4

In re Davidson S.S. Co.,
D. C. Wis. (1904), 133 F. 411 7

McCullough v. Kammerer Corp.,
323 U. S. 327, 65 S. Ct. 297 5

Petition of Martin,
E. D. Pa. (1951), 102 F. Supp. 43 7

Petition of Cherokee Trawler Corp.,
E. D. Va. (1957), 157 F. Supp. 414 ..... 6, 7

Petition of Moore-McCormack Lines,
S. D. N. Y. (1957), 147 F. Supp. 816 ..... 6, 7, 10

The Carroll, D. C. Md. (1932), 607 F. 2d 985 7

The 84-H, 2 Cir. (1923), 296 F. 427 ..... 6, 7, 10

The Rose Standish, D. C. Mass. (1928), 26 F. 2d 480 7

STATUTES

	Page
46 U. S. C. Sec. 182	10
46 U. S. C. Sec. 183	2, 11

TEXTS

Benedict on Admiralty, 6th Ed., Vol. 3, p. 557	7
The Law of Admiralty, Gilmore & Black, p. 700	11

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ADDITIONAL QUESTION PRESENTED

The two questions presented will not be restated, but a third will be presented, namely:

Whether, in the event certiorari is granted, Respondent is entitled to limit his liability to the value of his interest in the vessel involved in this proceeding.

STATEMENT OF THE CASE

The parties will be referred to as they were in the District Court, i.e., Petitioners here, claimants in the District Court, as claimants, and Respondent here, petitioner in the District Court, as petitioner.

This litigation is in admiralty. It concerns whether petitioner is liable for damage to the yacht basin and vessels of claimants, caused by a fire on petitioner's yacht RONAR at Miami, Florida, on January 16, 1957, and, if liable, whether petitioner may limit his liability to the value of his interest in the RONAR as provided by 46 U.S.C. Sec. 183.

The petition for exoneration from or limitation of liability, filed in the District Court for the Southern District of Florida, was in the usual form, alleging the fire on petitioner's vessel, the damage to claimants' property, that the damage was without fault on petitioner's part and was occasioned without his privity or knowledge, and prayed that petitioner be adjudged not liable for claimants' damage, or, if liable, that liability be limited to petitioner's interest in the RONAR, set at $4,500. (R. 2, 9).

The claimants' several answers denied the material allegations of the petition, made claims for damages, and each alleged numerous specific faults in the vessel and acts of negligence on the part of petitioner as various causes of the fire and damage (R. 20, 31-62, 64).

At the trial before the District Court, petitioner presented evidence on his lack of privity or knowledge and his right to limit liability (R. 85-228). At the close of petitioner's testimony, the District Court denied claimants' motion for a

ruling that petitioner had failed to meet his burden of proof (R. 228). The claimants then presented testimony on petitioner's negligence and liability (R. 228-279), following which there was rebuttal testimony (R. 281-336).

The District Court found that the fire on petitioner's vessel was caused by defective wiring, that petitioner and his agent, the master of the vessel, were negligent in failing to maintain the wiring in a safe condition, and that such negligence was the proximate cause of claimants' damage (App. A of Petition, p. 2.). On these findings the District Court held that petitioner was not entitled either to exoneration from or limitation of liability, and entered judgment against petitioner for the full amount of claimants' damage (App. A of Petition, p. 4, 5).

Petitioner appealed to the Court of Appeals for the Fifth Circuit, contending the evidence was insufficient to support either the findings on which liability was based, or that petitioner was not entitled to limit his liability to the value of his interest in the RONAR. (R. 80.)

The Court of Appeals rendered a decision that the District Court was in error in finding that defective wiring was the cause of the fire; that the evidence adduced was sufficient only to warrant speculation or conjecture as to the fire's origin, and was insufficient to establish negligence on the part of petitioner. Accordingly it rendered judgment for petitioner (App. C of Petition, p. 18, 19).

The Court of Appeals discussed the facts and the evidence in its decision (App. C of Petition, p. 8 et seq.). A further discussion elaborating upon the facts advantageously to petitioner is deemed inappropriate at this time.

From the decision of the Court of Appeals, the claimants now seek review by this Court through petition for certiorari.

ARGUMENT

The most obvious effort of claimants' Petition for Certiorari is to obtain a review of the evidence and a reversal of the factual determination of the Court of Appeals. This is apparent from the record, the decision of the District Court (App. A of Petition, p. 1), and that of the Court of Appeals (App. C of Petition, p. 8), from all of which nothing can be gleaned except the presentation and determination of facts, from the manner in which claimants make their statement more in terms, not of facts, but of testimony of witnesses in such a way as to make it appear that the testimony favorable to claimants outweighs that favorable to petitioner (Petition, p. 6-10); and from claimants' argument, a great deal of which is directed toward urging error in the determination of the factual issues by the Court of Appeals (Petition, p. 11-28). Finally, claimants openly exhibit their appreciation that this is a request for a factual review by acknowledging the reluctance of this Court to exercise its power of review where the decision below is wrong but its consequences affect only the particular litigants, then urging **Crumady v. The Joachim Hendrik Fisser**, 358 U. S. 428, 75 S. Ct. 445, as authority for the Court taking such action in this case (Petition, p. 27).

Certiorari will not lie merely to review the evidence or inferences drawn from it. **General Talking Pictures Corp. v. Western Electric Company,** 304 U. S. 175, 178, 58 S. Ct. 849. And the importance of the questions justifying certiorari in **Crumady v. The Joachim Hendrik Fisser** do not exist here.

Apart from the attempt to obtain review of the evidence, the two questions which claimants present are not asserted to be questions which were submitted or determined below, and the record and decisions of the two lower courts are barren of any indication that these questions were considered or determined. They are presented here for the first time, not really as questions concerning which there is conflict, although claimants tortuously attempt to make conflict appear, nor as questions concerning which the Court of Appeals was in error in deciding or refusing to decide, but as vehicles which claimants urge this Court to use to overturn the factual determination of the Court of Appeals by applying a different burden of proof, or a different measure of proof. This Court has repeatedly ruled that it will not consider questions not raised in or disclosed by the record or which were not considered or determined by the courts below. **McCullough v. Kammerer Corp.**, 323 U. S. 327, 65 S. Ct. 297; **Burnet v. Commonwealth Improvement Co.**, 287 U. S. 415, 53 S. Ct. 198.

The case does not warrant review by certiorari.

I

THE DECISION BELOW IS CLEARLY CORRECT

On petitioner's appeal of the District Court's decision to the Court of Appeals, petitioner was entitled to a review of the entire case, and while he was not entitled to a trial de novo, he was entitled to a reversal of any findings of fact which the Court of Appeals might determine to be clearly erroneous. The Court of Appeals reviewed the record and did determine that the District Court was in error in finding that defective wiring was the cause of the fire, that the

evidence was sufficient only to warrant speculation or conjecture as to the fire's origin, and was insufficient to establish negligence on the part of petitioner (App. C of Petition, p. 18). Since the Court of Appeals determined there was no liability, it entered judgment for the petitioner.[1]

All of the action of the Court of Appeals was clearly within its province, and in this effort to have that action reviewed, the only real question that can be asserted to exist is whether the Court of Appeals was wrong in its determination of factual issues. As the Court of Appeals pointed out (App. C of Petition, p. 18):

> "The parties do not cite many cases and there seems to be no sharp divergence between them as to what the law is."

The decision of the Court of Appeals is clearly correct.

II

THERE IS NO CONFLICT OF DECISION

1. The first question presented by claimants concerns the burden of proof. If petitioner understands this question as presented, under it claimants contend that the burden should have been on petitioner to show that he was not negligent because claimants raised an issue of petitioner's negligence, the RONAR was a pleasure craft, and petitioner

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[1] Where no liability is found upon consideration of all the evidence in a proceeding for exoneration from or limitation of liability in which the claimants have sought to establish liability, it appears to be settled procedure to enter judgment for the petitioner. *The H-H*, 2 Cir. (1923), 296 F. 427, 432, cert. den. 264 U. S. 596; *Petition of Moore-McCormack Lines*, S. D. N. Y. (1957), 147 F. Supp. 818, 820; *Petition of Cherokee Trawler Corp.*, E. D. Va. (1957), 157 F. Supp. 414.

was an individual owner. As argued, an additional element is interjected by claimants, namely that the negligence issue raised was that petitioner failed to avail himself of knowledge at his disposal which could have avoided the disaster, thereby, according to claimants, making the issue of privity or knowledge and of negligence one and the same thing (Petition, p. 13, 19).

The only question of the burden of proof determined by the Court of Appeals, which was implicit rather than expressed in the decision, was that the burden of proving petitioner's liability for claimants' damage was on claimants, for upon the finding that the evidence failed to establish negligence, judgment was entered for petitioner.

Claimants concede (Petition, p. 13, 15) that, in a suit for exoneration from or limitation of liability, generally the burden of proving the right to limit liability, or lack of privity or knowledge, is on the petitioner, while the burden of proving liability, including establishing negligence, is on claimants. Indeed, if a question can be said to be settled in the lower courts this one surely is.[2] In **Butler v. Boston S.S. Co.**, 130 U. S. 527, a limitation of liability proceeding, this Court implicitly recognized the rule and applied it by disposing of various claims as to the shipowner's negligence with the comment that the evidence did not establish such allegations, as was done by the Court of Appeals in the instant case.

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2 The rule is set forth in Benedict on Admiralty, 6th Ed., Vol. 3, p. 557. Cf. *The 84 H*, 2 Cir. (1923), 296 F. 827, cert. den. 264 U. S. 596; *Petition of Moore-McCormack Lines*, S. D. N. Y. (1957), 147 F. Supp. 816, 820. *Cruse v. Sabine Transp. Co., Inc.*, 5 Cir. (1937), 88 F. 2d 298; *The Rose Standish*, D. C. Mass. (1928), 26 F. 2d 880; *Petition of Cherokee Towler Corp.*, E. D. Va. (1957), 157 F. Supp. 111; *Petition of Martin*, E. D. Pa. (1951), 102 F. Supp. 43; *The Carroll*, D. C. Md. (1933), 60 F. 2d 985; *In re Davidson S.S. Co.*, D. C. Wis. (1901), 133 F. 111.

Claimants contend, however, that since the negligence issue raised by them and the issue of petitioner's privity or knowledge in this case "cover identical ground" they are one and the same issue; and that the Court of Appeals should have placed on petitioner the burden of proving, not only that he lacked privity or knowledge, but also that he was not negligent. Claimants do not undertake to show how the issue of negligence and the issue of privity or knowledge are the same issue, they merely make the bald assertion that this is so, based on the fact that they raised an issue concerning petitioner's knowledge. If this conclusion were correct, all that any claimant in a proceeding for exoneration from or limitation of liability would have to do to relieve himself of the burden of establishing the shipowner's liability for the claimant's damage would be to allege in his answer to the petition that the shipowner negligently failed to avail himself of knowledge that could have avoided the accident.

Negligence, or the issue thereon, and the issue on privity or knowledge are not the same thing. The failure of a shipowner to carry his burden of establishing his lack of privity or knowledge will result in loss of the right to limit liability, but it will not make the shipowner liable unless the party damaged carries his burden of proving liability, either in the proceeding to limit liability or some other proceeding brought by the damaged party after the limitation proceeding has been dismissed; and this is so regardless of the issues that are raised. One need only consider the converse of claimants' position to realize the fallacy of it. If the position were correct, petitioner could exonerate himself from all liability by proving lack of privity or knowledge in any

limitation proceeding in which a claimant raised an issue of negligence concerning petitioner's knowledge.

Further, claimants' position ignores the fact that the negligence found by the District Court; regardless of the issue tendered, concerned, not something that petitioner knew or negligently failed to know, but something he negligently failed to do, namely, to maintain the vessel's wiring in a safe condition. Still further, it ignores the fact that the Court of Appeals' determination was founded on the insufficiency of the evidence to establish the cause of the fire, the burden of proof of which claimants concede was upon them (Petition, p. 15). No matter how the point be labored, privity or knowledge and negligence in this case cannot be made the same thing so as to place the burden of proving lack of negligence on the petitioner on consideration of the entire evidence.

Next, having asserted that privity or knowledge and negligence in this case are one and the same thing, claimants argue as though this were established, and use the phrases interchangeably in an attempt to show a conflict of decision between the present case and the decision in **Coryell v. Phipps,** 317 U. S. 406, where the Court held that the burden of establishing lack of privity or knowledge is on a petitioner. Apparently, claimants' argument is that, since privity or knowledge and negligence are the same thing in this case, the Court of Appeals, by placing the burden of proving negligence on claimants, likewise placed the burden of proving petitioner's privity or knowledge on claimants, in conflict with **Coryell v. Phipps** (Petition, p. 15). Conceivably, a case might exist where the point of factual difference between the parties narrowed itself down to the

proof of a single fact on which both negligence and privity or knowledge might turn, but such is certainly not the case here, nor is it asserted to be by claimants. The mere statement of claimants' proposition exhibits its double fallacy. Not only are negligence and privity or knowledge not the same thing in this case but the Court of Appeals made no determination concerning the burden of proving privity or knowledge, or lack of it.

Claimants next assert that the Court of Appeals, in reversing the District Court's finding that petitioner was not without privity or knowledge, "shifted the burden of proof of petitioner's negligence to claimants, contrary to this Court's decision in **Coryell v. Phipps** . . ". (Petition, p. 17). The assertion is clearly erroneous in its major premise. The Court of Appeals made no disposition whatever of the mentioned finding of the District Court. None was necessary in view of the determination that there was no negligence. Since there was no negligence, there was no liability to limit, and any consideration of privity or knowledge by the Court of Appeals became moot. **The 84-H,** 2 Cir. (1923) 296 F. 427, cert. den. 264 U. S. 596, **Petition of Moore-McCormack Lines,** S. D. N. Y. (1957), 147 F. Supp. 816, 820. Further, the decision of **Coryell v. Phipps** is not authority against placing the burden of proof of negligence on claimants.

But, say the claimants, by its decision the Court of Appeals has extended to the limitation of liability statute a conflict concerning burden of proof that exists under the fire statute (46 U. S. C. Sec. 182), under which a shipowner is exempt from liability to cargo for fire damage occurring without the shipowner's design or neglect. Claimants cite

authority indicating some conflict under the fire statute as to who has the burden of proving design or neglect, or lack of it, and urging that the shipowner be required to carry the burden of proving lack of design or neglect, as he is burdened with proving lack of privity or knowledge in limitation of liability proceedings. (**The Law of Admiralty,** Gilmore & Black, p. 700; Petition, p. 20). Aside from the complete irrelevancy of the fire statute to this case, here again claimants are fallaciously asserting that lack of privity or knowledge and negligence are the same, using the terms interchangeably, and erroneously claiming that by placing the burden of proving liability on claimants the Court of Appeals also placed on claimants the burden of proving petitioner's privity or knowledge. This effort to establish a conflict of decision must fall like the one concerning the claimed conflict with **Coryell v. Phipps,** 317 U. S. 406, and for the same reasons.

2. The second question presented is whether, because petitioner was an individual owner of a pleasure craft, the considerations governing proof of negligence are the same as in cases involving a commercial vessel.

The argument of claimants on this question is that the limitation of liability statute (46 U. S. C. Sec. 183) was enacted to encourage the investment in commercial shipping, not pleasure craft. Claimants concede that the act is applicable to pleasure craft, as indeed they must, since the language of the statute (46 U. S. C. Sec. 183(b)) clearly shows that Congressional intent, but urge that some different measure of proof be used in pleasure craft cases. Claimants suggest no formula or principle for effecting this difference in the measure of proof. The text authority cited

suggests effecting a differentiation based on the construction of the words "privity or knowledge" (Petition, p. 20). Accordingly claimants again return to the idea that negligence and privity or knowledge is the same, and urge that in determining whether petitioner was without privity or knowledge, the Court of Appeals failed to give proper consideration to the District Court's conclusions on the matter (Petition, p. 22). As heretofore pointed out, the Court of Appeals did not determine whether petitioner was without privity or knowledge. It determined that there was no liability, at which point the question of privity or knowledge ceased to be relevant.

The second point made by claimants under their second question is that the Court of Appeals failed to view the evidence in the light of the Congressional purpose of the limitation statute (Petition, p. 24). Since claimants did not raise this point below, the decision of the Court of Appeals is silent on it. Claimants do not point out just how the Court of Appeals failed to give consideration to the legislative purpose other than that it decided the case against them, but instead plunge into an argument on the evidence and conclude that "the decision of the Court of Appeals on the facts alone is unjust, and is itself 'clearly erroneous' " (Petition, p. 25).

Petitioner will not enter into a discussion of the merits of the factual issues of this case. Such argument has no place in this brief. But on this second point claimants make quite clear that the only real question is whether this Court should review the evidence and determine whether the Court of Appeals was correct in its view.

The Petition for Certiorari completely fails to show that the Court of Appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter, or has decided a federal question in a way in conflict with applicable decisions of this Court.

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

On the proposition of the decision by the Court of Appeals of an important question of federal law which has not been, but should be, settled by this Court, claimants, at the opening of their argument (Petition, p. 11), and at its closing (Petition, p. 28), make a general assertion of the importance of this case, but they fail to establish that any question decided below is of import to anyone other than the parties involved, and they fail to point out how, on the record in this case, an important question could be reached by this Court. Undoubtedly, in the application of the limitation of liability statute to pleasure craft important questions exist, but not in this case.

IV

SHOULD CERTIORARI BE GRANTED, PETITIONER'S RIGHT TO LIMIT LIABILITY SHOULD BE CONSIDERED

In the Court of Appeals, petitioner sought review of both the question of his liability to claimants and his right to limit liability to the value of his interest in his vessel. The Court of Appeals made no determination concerning petitioner's lack of privity or knowledge, or his right to limit liability, this being unnecessary in view of the decision made.

Petitioner's position is that certiorari should not be granted in this case, but if it should be and the case re-opened for review, petitioner now points out that he is entitled to a review of the District Court's determination on his right to limit liability. This question is raised to prevent petitioner's loss of his right to such review by failure to raise the point.

CONCLUSION

For the foregoing reasons it is submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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